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IN THE

Supreme Court of the United States

October Term, 1972

72-1047

WEATHER WISE COMPANY,
Petitioner

v.

AEROQUIP CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

C. BENTON MUSSLEWHITE &
THOMAS R. BEECH
HOLLAND & BEECH
1210 Chamber of Commerce Bldg.
Houston, Texas 77002

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Weather Wise Company petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 14-17) is not yet officially reported. The United States District Court for the Southern District of Texas did not render a written decision in this case, but rendered judgment (J.A. 69-70).[1]

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[1] "J.A." refers to the Joint Appendix in the Court of Appeals.

JURISDICTION

The judgment of the court of appeals was entered on November 3, 1972 (App. A, *infra*, p. 14). The jurisdiction of this Court invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether the term "combination" in construing the Sherman Act, and the definitions as stated in the recent Supreme Court case of *Albrecht* v. *Herald Co.*, 390 U.S. 145, 88 S.Ct. 869, 19 L.Ed.2d 998 (1968), a price fixing combination, applies to cases of refusal to deal and other unreasonable restraints of trade.

STATUTE INVOLVED

This case was brought under Section 1 of the Sherman Act, 26 Stat. 209, 15 U.S.C.A. 1.

STATEMENT

On September 3, 1969, Weather Wise Company, (hereinafter referred to as Weather Wise) filed a complaint against Aeroquip Corporation, (hereinafter referred to as Aeroquip) alleging, in part, that Aeroquip not only refused to sell but did so in combination with competitors of Weather Wise and threatened its customers against selling to Weather Wise.

Trial began on November 8, 1971, and on November 16, 1971, the jury returned its verdict finding that Aeroquip's sales policy in its application unreasonably restrained trade in violation of Section 1 of the Sherman Act.

The jury verdict returned damages of $65,000.00, which was trebled. The Federal District Judge found a combination existed between Aeroquip and its Original Equipment Manufacturer customers as a matter of law.

Aeroquip's request that the jury make such finding of combination was denied by the judge. Aeroquip then appealed to the United States Court of Appeals for the Fifth Circuit. The U. S. Court of Appeals for the Fifth Circuit found as a matter of law that the required combination under Section 1 of the Sherman Act did not exist and reversed and rendered the judgment obtained by Weather Wise.

FACTS

Aeroquip's 5700 Series coupling is patented and is so efficient a device for precharging that it is used by a majority of manufacturers in the entire air conditioning industry (J.A. 285-288). There are eighty such manufacturers, including most of the large air conditioning manufacturers such as Fedders, Trane, York, General Electric, Friedrich, and Westinghouse (J.A. 289-291, 328-336). Such manufacturers make all three parts of an air conditioning system and thereby qualify as an OEM[2] customer of Aeroquip.

When such manufacturers install a 5700 coupling on any part of an air conditioning system it must be installed on the remaining component parts of that system to be sold competitively (J.A. 110-113, 171, 275-276). So in every case where an OEM condenser is sold to any customer who wants to use a vendor[3] manufactured air handler, that vendor must obtain the 5700 coupling to install on his air handler. By definition a vendor only manufacturers a part of an

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[2] "OEM" used throughout this Brief refers to original equipment manufacturers as defined in Aeroquip's Sales Policy on 5700 Series couplings to mean those manufacturers who make a complete air conditioning system, all three parts — condensor, air handler, and connecting lines, and who are Aeroquip customers.

[3] "Vendors" used throughout this Brief means manufacturers of component parts of an air conditioning system, in other words, manufacturers who do not manufacture a complete system.

air conditioning system so in any sales it makes its product must be matched to a product manufactured by someone else, an OEM.

Aeroquip developed a sales policy for marketing the 5700 Series coupling that was stated in a letter Aeroquip sent to Weather Wise in May, 1969, and is as follows:

> "It has always been our policy to sell Aeroquip 5700 refrigerant couplings to original equipment manufacturers of complete refrigeration/air conditioning systems who possess all of the following qualifications:
>
> "1. Manufacturers a complete refrigeration system.
>
> "2. Sells a complete system.
>
> "3. Services a complete system.
>
> "4. Engineers a complete system.
>
> "5. Advertises a complete system.
>
> "6. Maintains facilities capable of properly processing Aeroquip couplings into his system to insure maximum quality control.
>
> "There has been one exception to this policy. Our 5700 couplings have been sold to vendors of components where the qualified OEM has requested us to do so. In these cases, the OEM has maintained engineering control over such components.
>
> . . . "If you are supplying components to qualified original equipment manufacturers using 5700 couplings, we will accept orders for the number of couplings you require as a vendor, *provided we receive written authorization from the qualified manufacturers.*" (J.A. 344-346). (Emphasis Added)

When Weather Wise asked for more specifics from Aeroquip on this sales policy, Aeroquip replied by letter dated June 25, 1969, as follows:

"Any original equipment manufacturer of complete air conditioning systems using Aeroquip 5700 couplings *may authorize us to sell on a direct basis any specific quantity of couplings* to his designated component manufacturer. The original equipment manufacturer, as defined in our letter to you of May 20, should write to us specifying the following:

"1. Name of his vendor.

"2. Where to ship the couplings.

"3. Quantity of each Aeroquip part number required." (J.A. 98). (Emphasis Added)

Aeroquip officers explained that the OEM had to furnish the quantity of each Aeroquip part number required, as well as the name of the vendor and where to ship the couplings, for each and every sale to a vendor (J.A. 88, 99, 102).

The admitted reason Aeroquip had for developing this sales policy was to, "maintain the integrity of refrigeration systems", and that such integrity was not maintained when, "components of the systems are manufactured by people other than those who designed the system in toto." (J.A. 86-89, 130-132). Aeroquip admits that the couplings themselves were a relatively small part of the reason for such policy (J.A. 87-88).

An officer of Borg-Warner Corporation (York) explained the advantages of Aeroquip's sales policy to an OEM, and testified that it enables the OEM to sell its complete air conditioning system and prevented vendors from selling their products to match up to OEM made products (J.A. 256-257)

Aeroquip admits that it will not sell to any vendors unless it receives a letter from one of its OEM customers authorizing it to make such sales (J.A. 88, 90-91, 102, 273). The record clearly establishes that the OEM and not Aeroquip determined whether a particular vendor was able to

purchase the coupling from Aeroquip. In the case of one vendor, Metal Fab., Inc., who had an Aeroquip OEM as a good friend, it obtained an authorization letter entitling it to purchase fittings direct from Aeroquip, though it manufactured nothing for the OEM (J.A. 126-129).

Other vendors obtained OEM authorizations because they sold their products to the OEM (J.A. 88). They could usually obtain more couplings from Aeroquip than were required to merely fill the orders to the OEM. In such cases, these vendors could use the extra couplings on its products and sell them to the customers of other vendors who could not obtain the couplings. The record shows that this occurred when Magic Aire, a vendor, obtained written authorization from General Electric, to whom it sold, that enabled it to buy the 5700 couplings from Aeroquip in sufficient number to be able to supply a customer of Golden Crescent Sales, also a vendor, who had no letter and, therefore, could not get enough fittings (J.A. 116-119, 149-151, 326-327).

Such vendors could also sell the excess couplings on the black market for a nice profit. The black market arose from the simple fact that those vendors who could not buy the couplings from Aeroquip had to obtain them from somewhere if they wanted to sell their product to be matched with any product manufactured by an Aeroquip OEM, so they phoned and visited other vendors and bought, sold, traded and borrowed couplings (J.A. 112, 116, 230-232, 270-271, 276-277). Most such purchases were at premium prices, as in the case of Weather Wise to the tune of some $45,000.00.

Weather Wise manufacturers air handlers and in the early part of 1969, entered into an agreement with Cambridge-Lee to manufacture and market tube sets (J.A. 181-

182, 183-184). Aeroquip also decided to manufacture and market its own line of tube sets and began a national advertising program in January, 1969 (J.A. 84-85).

Sometime in February, 1969, Darvin Watson, President of Weather Wise, contacted Aeroquip and attempted to purchase the required 5700 coupling (J.A. 89). When refused the right to purchase such couplings, Mr. Watson complained that Golden Crescent Sales and other vendors in competition with Weather Wise were obtaining the coupling direct from Aeroquip and even had enough to resell some (J.A. 89-90).

Aeroquip's Marketing Manager, Frank Foley, then wrote letters in May, 1969, to some five vendors, including Weather Wise and initiated a check on the qualifications of other vendors by Aeroquip's salesmen throughout the United States to make sure that the sales policy was followed (J.A. 88-91, 336-346).

Prior to this time, 1969, Aeroquip was admittedly lax in the enforcement and administration of its sales policy on the 5700 coupling (J.A. 81-82).

In the face of Aeroquip's refusal to sell the 5700 couping directly to Weather Wise, arrangements were made to purchase a sufficient number of couplings from Southwest Manufacturing Company — a fully qualified OEM of Aeroquip (J.A. 136-137). But Mr. J.C. Owens, President of Southwest, testified that Aeroquip refused to fill one of his company's orders for couplings because Aeroquip found out Southwest was going to resell them (J.A. 136-139). In making such refusal, Aeroquip Sales Representative, Sam Thomas, answered President Owens' inquiry as to whether Aeroquip would continue to supply Southwest's requirements for 5700 couplings, by stating, "Well, I think they will go ahead and honor that order." (J.A. 136-137).

The record further shows that Sam Thomas, Aeroquip Sales Representative, told Mr. Charlie Siegal, President of Golden Crescent Sales Corporation, when his company was also a qualified Aeroquip OEM, that he could, "definitely not resell" the couplings (J.A. 114-115).

Solely because of the inability to obtain a sufficient supply of 5700 couplings, Weather Wise was forced out of the tube set line business and lost a substantial amount of business for its air handlers (J.A. 185-186, 228-230, 264-267).

REASONS FOR GRANTING THIS WRIT

The issue of whether and under what circumstances a "combination" exists within the meaning of Section 1 of the Sherman Act is an important and recurrent one in the administration of our national antitrust laws. The court below erroneously relied on the outmoded and much qualified *Colgate* doctrine, *United States* v. *Colgate Co.*, 250 U.S. 300 (1919), in holding that there was no Sherman Act combination possible in the instant case. The court's decision conflicts with this court's decisions in *Albrecht* v. *The Herald Company*, 390 U.S. 145 (1968), *United States* v. *Parke, Davis & Co.*, 362 U.S. 29 (1960), and *U.S.* v. *Arnold Schwinn & Co.*, 388 U.S. 365 (1967).

1. In construing the Sherman Act, it was early recognized that resort must be had to the common law in order to ascertain the meaning of the terms "contract, combination . . . or conspiracy in restraint of trade" and to determine whether or not particular acts come within the ambit of this section. In re *Greene*, 52 F.103 (C.C.S.D. Ohio, 1892); see *Standard Oil Co.* v. *United States*, 221 U.S.1, 31 S.Ct. 502, 55 L.Ed 619 (1911). These three terms have acquired somewhat unique meanings under this statute which distinguish them from traditional definitions normally employed in other areas of the law.

The statutory term, "combination," is normally defined as a union or association of two or more persons for the achieving of a common object. *Northern Securities Co.* v. *United States*, 193 U.S. 197, 24 S.Ct. 436, 48 L.Ed 679 (1904). However, a combination can also be defined as a unilateral act committed by a first party in dealing with a second party wherein the latter concurs in the former's acts and related policies with knowledge of their intended effect. See *Albrecht* v. *Herald Co.*, 390 U.S. 145, 88 S.Ct. 869, 19 L.Ed.2d 998 (1968).

Aeroquip's sales policy enabled its OEM customers, who comprise a majority of all the air conditioning manufacturers in the United States, to sell their complete air conditioning systems — and prevented vendors, such as Weather Wise, from selling their products to match up to any of the OEM made products. As the court below found, "Without obtaining these couplings, a component made by a non-OEM manufacturer could not be attached to and integrated with the total OEM system." (App. A, *infra*, p. 16).

Recognizing this fact, Aeroquip's sales policy completely abrogated to its OEM customers and to them alone the right to select or reject the vendors who could purchase couplings from Aeroquip. The facts are undisputed that if an OEM wrote a letter authorizing Aeroquip to sell couplings to a particular vendor, Aeroquip sold. If the vendor could not get such an authorization, Aeroquip refused to sell. As Aeroquip's marketing manager put it, he has, since 1968, refused to sell to a vendor that was not authorized by an OEM (J.A. 90).

Moreover, for each subsequent sale to the vendor, Aeroquip required the OEM to specify and report back to it the quantity of couplings required, the name of the vendor, and where to ship the couplings.

The OEMs fully complied with the requirements of the sales policy with the result that Weather Wise was forced out of business and others who attempted entry into the air conditioning market failed or lost substantial business.

Petitioner asserts such facts constitute a stronger "combination" than one between a supplier and a distributor's former retail customers, who had been merely contacted by the supplier in an effort to take them away from the distributor, that this court found to constitute a "combination" under Section 1 of the Sherman Act in *Albrecht*.

2. At the time the Sherman Act was enacted, its draftors obviously could not forsee the many sophisticated business and economic arrangements in American industry that have emerged in recent years, nor could they anticipate the multiple varieties of innovative devices that have been conjured up by inventive businessmen in an effort to circumvent Section 1 of the Sherman Act.

Such is the case at hand, by the ingenious terminology of its sales policy, Aeroquip has achieved the ultimate goal of avoiding the most basic purpose of the Sherman Act — to prohibit practices which eliminate competition and tend toward monopoly. Aeroquip's customers name among the giants of the air conditioning industry, Fedders, Trane, York, General Electric, Westinghouse, with sales in the hundreds of millions of dollars.

Aeroquip's couplings range in the $0.54 (fifty-four cents) to $1.94 (one dollar ninety-four cents) price range, yet its sales for one year amounted to about six million dollars (J.A. 84, 377). The couplings are inexpensive in comparison to a compressor or air handler that costs several hundred dollars each. So to satisfy and protect its customers Aeroquip gave them the absolute right to authorize sales of the coupling to vendors. Couplings that the court below found to

be required by vendors to sell in connection with any OEM product using the coupling. Yet the court below found such authorization unimportant because it "extended" the customers Aeroquip would sell to. Thus, the court concluded that Aeroquip's refusal to deal was unilateral under the *Colgate* doctrine. (App. A, *infra*, p. 17). How can such an "extension" of customers satisfy the Sherman Act with OEMs controlling which of its competitors, i.e. vendors, could purchase the coupling that enabled them to compete for the entire OEM market that used Aeroquip couplings?

This court decided in *United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 80 S.Ct. 503 (1960), against a company's wholesale and retail resale price fixing efforts that had no actual "agreement". The firm had announced a policy of resale pricing. Its two-fold fault, in this court's view (as this court explained in *Albrecht*) was that, rather than enforcing the policy by merely refusing to deal with noncomplying dealers, (1) it created a combination with wholesalers, who cooperated by cutting off retailers who did not accede and (2) the company created a combination with retailers because their acquiescence in suggested prices was secured by threats of termination. Thus, the court observed the Section 1 Sherman Act necessity of a contract, combination, or conspiracy, concluding that the company's refusal to deal was not, in fact, wholly unilateral. The involvement of wholesalers and the discussions with retailers each amounted to going beyond the mere announcement of policy and simple refusal to deal apparently approved in *Colgate*.

Aeroquip here too has gone far beyond a mere announcement of its sales policy and a simple refusal to deal and the effect of that sales policy on small vendors, like Weather Wise, has not been questioned by Aeroquip.

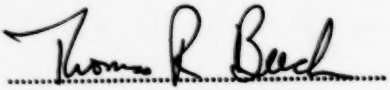
Weather Wise manufactured air handlers and tried to expand into the tube line business in 1969. That same year

Aeroquip entered into the tube line business for the first time and for the first time in 1969 Aeroquip began to really enforce its sales policy. That enforcement included stopping one of its OEM customers, Southwest Manufacturing Company, from supplying Weather Wise with couplings. Weather Wise was forced to end its tube line business and by the time of trial had one employee left. For as another vendor testified at trial regarding the necessity for the couplings, "They're my lifeline. I either do that or go out of business." (J.A. 114).

The court below held that Aeroquip's attempts to control its couplings after sale did not constitute resale restrictions violating *U. S.* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), "but were merely an attempt by Aeroquip to follow its own sales policy of not knowingly selling couplings for resale." (App. A, *infra*, p. 17). But the attempts to control resale were just one part of Aeroquip's entire sales policy that effectively prevented vendors from competing with Aeroquip's OEM customers. It would appear that the court below now creates an exception to *Schwinn* that would allow resale restrictions in compliance with an Aeroquip-type sales policy.

CONCLUSION

Petitioner respectfully submits that Aeroquip and its OEM customers should not have the right to join together and decide which vendors exist in the OEM air conditioning market and which *cannot* because they are unable to purchase the Aeroquip coupling and for the reasons stated, the petition for certiorari should be granted.



Thomas R. Beech
Attorney for Petitioner

JANUARY, 1973

APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 72-1348

WEATHER WISE COMPANY,
Plaintiff-Appellee,

v.

AEROQUIP CORPORATION,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

(November 3, 1972)

Before DYER, SIMPSON and MORGAN, Circuit Judges.

DYER, Circuit Judge: This is an appeal from a judgment of the district court entered upon a jury finding that Aeroquip Corporation had engaged in unreasonable restraints of trade in violation of section 1 of the Sherman Act. In the charge to the jury the court instructed, as a matter of law, that the requisite combination in restraint of trade did exist. We reverse.

To understand the alleged Sherman Act violation in this case, it is necessary to have a basic understanding of one

segment of the air conditioning industry.[1] A complete air system consists of three parts: (1) a compressor or condensor; (2) an evaporating and air handling unit; and (3) a set of tubing that connects these two components, allowing the refrigerant to flow between them. Because an air conditioner must be a closed system and must contain only pure refrigerant, the components of the earliest systems were shipped to the point of installation without containing any coolant. There the parts were connected and, after an expensive and inefficient process, the system was charged with the coolant. The dissatisfaction with this procedure led to the development of components that could be charged at the factory and shipped ready for immediate installation and use. For the purposes of this case, the important aspect of this precharging process is the coupling device that allows the component to be charged and then connected to the other components without losing refrigerant or having the system become contaminated. Aeroquip is a manufacturer of such a coupling device and controls a substantial portion of the market.

The present controversy concerns Aeroquip's sales policy which limits its sales of couplings only to those companies who manufacture complete air conditioning systems. These manufacturers are called Original Equipment Manufacturers (OEM's). The stated reason for this policy is that this maintains the integrity of air conditioning systems and thereby assures quality control.

The only recognized exception to this policy, or a second portion of it, is that Aeroquip will sell to a component manufacturer if an OEM states in writing that the manufacturer is makng one part of the complete system for the OEM.

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[1] This appeal is not concerned with one-piece air conditioners, but only with larger systems which have the various parts located separately.

Without obtaining these couplings, a component made by a non-OEM manufacturer could not be attached to and integrated with the total OEM system.

Weather Wise Company was a manfacturer of the air handling and tube set components found in a complete system, but, because it did not make compressors, it was not classified by Aeroquip as an OEM. Consequently, with no direct access to Aeroquip's couplings, Weather Wise either had to find an OEM which would state that Weather Wise was one of its suppliers, or it had to purchase from a direct customer of Aeroquip that had a surplus. Weather Wise was successful only with the latter approach and brought this action to recover treble the damages it suffered from the higher prices it paid for the couplings and from the sales lost as a result.

The determinative question on this appeal is whether the recited facts are sufficient to constitute a combination within the purview of the Sherman Act. The district court found, as a matter of law, that the writing of letters to Aeroquip by OEM's identifying the component manufacturers providing parts to the OEM's was sufficient cooperation with Aeroquip to constitute a combination under the Act. We disagree.

Because it was stipulated that Aeroquip's sales policy was established unilaterally, only the application of that policy could be questioned. Our examination of that application, however, shows that it is within the confines of *United States* v. *Colgate & Co.*, 1919, 250 U.S. 300, as narrowed by *United States* v. *Parke, Davis & Co.*, 1960, 362 U.S. 29, and *Albrecht* v. *Herald Co.*, 1968 390 U.S. 145. Aeroquip's activities, which included no attempt to control prices, were limited solely to its refusing to deal with manufacturers who did not qualify under its pre-existing sales policy. The writing of letters to Aeroquip by OEM's in no

way aided Aeroquip's refusal to deal, but instead was the only way that Aeroquip would *extend* its list of direct customers. In short, Aeroquip's refusal to deal was unilateral, and any combination that existed furthered distribution without restraining trade.

Whether Wise also urges that statements by Aeroquip personnel that an OEM was not to resell or that an OEM would not be sold couplings for resale constituted an illegal refusal to deal. It is clear, however, that such statements, if made, were only the result of Aeroquip's restating and following its own unilateral sales policy.

Whether Wise's final assertion is that these statements amount to restrictions on the resale of the couplings in violation of *U.S.* v. *Arnold, Schwinn & Co.*, 1967, 388 U.S. 365. This argument also is not persuasive because Aeroquip's actions did not constitute resale restrictions but were merely an attempt by Aeroquip to follow its own sales policy of not knowingly selling couplings for resale.

Because our finding that there was no Sherman Act combination disposes of this appeal, we do not reach the questions of the propriety of using deposition summaries[2] or of the correctness of admitting certain documents as business records.

The judgment of the district court is reversed and judgment is rendered for Aeroquip Corporation.

REVERSED and RENDERED

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[2] We nevertheless take note that the use of deposition summaries in jury cases is, to say the least, highly unusual. The problem presented here is non-recurring, however, because the local rule under which these summaries were apparently authorized has been changed.